No. 90.

Brief of Carlisle for Appts.

Supreme Court of the United States.

October Term, 1897.

Filed Oct. 28, 1897.

No. 90.

GUADALOUPE THOMPSON, ADMINISTRATRIX, ETC., ET AL.,

Appellants,

vs.

THE MAXWELL LAND GRANT AND RAILWAY COMPANY ET AL.,

Appellees.

No. 91.

CHARLES BENT ET AL.,

Appellants,

vs.

GUADALOUPE MIRANDA ET AL.,

Appellees.

BRIEF FOR APPELLANTS.

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For Appellants.

PRESS OF
JUDD & DETWEILER,

IN THE

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GUADALOUPE THOMPSON, ADMINISTRATRIX, ETC., ET AL., *Appellants*, *vs.* THE MAXWELL LAND GRANT AND RAILWAY COMPANY ET AL., *Appellees*.	No. 90.
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BRIEF FOR APPELLANTS.

By agreement, these two causes were consolidated and heard together, both in the district court and in the supreme court of the Territory of New Mexico, from which these appeals are prosecuted.

The litigation has been pending for a number of years, and the records are somewhat voluminous, but, as the controlling questions in both cases relate to the regularity and validity of the orders or decrees entered by the district court for Taos county, New Mexico, on the 12th day of April, 1866, and the 13th day of September, 1866, in the case of the heirs of

Charles Bent against the heirs of Charles Baubien and others, it would be useless to encumber this brief with a detailed recital of all the pleadings and other matters contained in the records. The orders or decrees referred to will be found on pages 125 and 129, in case No. 90, and on pages 69 and 73, in case No. 91.

Case No. 90 was before this Court on appeal several years ago, and is reported in 95 U. S., 391, to which we refer for its history up to that date. After its return to the court below, an amended bill was filed by the complainants, to cure the defects for which the judgment was reversed here, and additional evidence was introduced and further proceedings had, which resulted in the decree now appealed from. A substantial statement of case No. 91 is contained in the brief of associate counsel, to which, also, we refer the Court.

In 1859, the heirs of Charles Bent filed a bill in the district court sitting in Taos county against Charles Baubien, Lucien B. Maxwell, and others, claiming an undivided one-third of a tract of land supposed to contain about two million acres, commonly known as the Maxwell grant, and praying for a partition between themselves and the other owners. The object of that action was twofold: First, to establish the interest, which was controverted, and, secondly, to have the interest, when established, set apart to the complainants. (Record in 90, pp. 102–107; Record in 91, pp. 46–51.)

Answers were filed, testimony was taken, and the cause was ried on the merits at the June term, 1865, when the following decree was made by the court:

"And now on this day came the parties, by their counsel, and this cause having been at a former term of this court heard upon the bill and amended bill, and the answer thereto, the

supplemental bill and the answer, and the testimony herein on file, as taken in this cause, which cause was taken under advisement by the court as to the decree which should be made in the premises, and the court being fully advised, in consideration thereof, therefore it is ordered, adjudged, and decreed by the court that the said complainants, Alfred Bent, Estefana Hicklin, and Teresina, otherwise Teresa T. Bent, be, and are hereby, declared to be the natural son and daughters of the said Charles Bent in the said bill mentioned, by him begotten upon and conceived and born of Ygnacio Jamarillo, within the Territory of New Mexico, formerly the department or province of New Mexico, and at the time the said Alfred, Estefana, and Teresa were begotten and conceived no lawful impediment existed to prevent the said Charles Bent and Ygnacio Jamarillo from in due form of law solemnizing a contract of marriage, the one with the other; that as such natural children the said Alfred, Estefana, and Teresa, in the absence of any child or heir born in wedlock to the said Charles Bent, became and were at the time of his decease the true and lawful heirs of his body in this Territory, with the full power, right, and authority to inherit, succeed to, and receive the estate, property, rights, and interests of property of the said Charles Bent in the said Territory, and that as such children and heirs they are justly and lawfully entitled to have, maintain, receive, possess, and enjoy all the rights, interest, and estate which in law or equity belonged or pertained to the said Charles Bent at the time of his decease, of, in, or to the lands, real estate, or grant as described and set forth in the complainants' bill and the exhibit therein referred to, which description is as follows, to wit: Commencing below the junction of the Ryado river with the Colorado, thence in a direct line to the east to the first hills, and from thence running parallel with said Colorado river to the north, to a point in front of the junction of the Una de Gato with the said Colorado river; thence following said hills to the east of the said river of the Una de Gato to the summit of the mesa; thence

turning to the northeast along said summit to the summit of the mountain that separates the waters that flow to the east from those that flow to the west, and from thence following the said mountain to the south of the first ceja south of the Ryado river, and from thence following the summit of said ceja east to the place of beginning.

"It is further ordered, adjudged, and decreed that the said Charles Bent at the time of his decease was justly and equitably entitled and seized of one undivided fourth part of the estate in and to the said tract of land, real estate, or grant, and that the said Charles Beaubien and Guadalupe Miranda were at said time so entitled and seized of an equal undivided share of the remaining three-fourths of the said tract or grant.

"Furthermore, that the said Alfred, Estefana, and Teresina (alias Teresa T.), upon the decease of their said father, inherited, succeeded to, and became seized of the said undivided one-fourth part interest and estate which belonged or pertained to the said Charles Bent in law and equity in and to the land or real estate in the entire tract or grant aforesaid at the time of his decease, and that the said Alfred Bent, Estefana, and Teresina are now fully and absolutely entitled to and seized of the undivided one-fourth part of the interest and estate of the said tract of land or grant.

"Furthermore, that the said undivided one-fourth part in and to the said tract or grant of land or real estate be, and hereby is, declared established and confirmed to them, the said Alfred, Estefana, and Teresina (alias Teresa T.), and to their heirs and assigns forever, with the full and perfect right, powers, and authority to possess and enjoy the same."

The decree then prescribed with great particularity the manner in which the partition should be made, named the commissioners and directed them to report, adjudged that the complainants should pay to the defendants Maxwell and the heirs of Baubien, who died pending the suit, the sum of one hundred dollars, being one-fourth of the amount ex-

pended by them in procuring the confirmation of the grant by the Government of the United States, and then it was provided that "the court now reserves and suspends its decree as *to the partition and payment of the costs in this cause* until a future term of the court." In December, 1865, after this decree and after the expiration of the term of the court, Alfred Bent, one of the complainants, was shot and killed, leaving a widow, Guadalupe Bent, and three children, Charles Bent, Julian Bent, and Alberto Silas Bent, all whom were infants of tender years. At the ensuing term of the court, April 9, 1866, the death of Alfred Bent was suggested, and the three infant children were, by an order of the court, made "parties complainant" (Rec. 90, p. 125; Rec. 91, p. 69). At the same time, on the 12th day of April, the following order was made:

"By agreement of the parties, the continuance of this cause, made herein on a former day of this term of this court, is set aside, and on motion of solicitors for complainants, Guadalupe Bent [is] hereby appointed guardian *ad litem* and commissioner in chancery for the minors of Alfred Bent in this cause, with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate therein described to Lucien B. Maxwell, one of the defendants in said cause, and this cause stands continued until the next term of this court."

Rec. 90, p. 125; Rec. 91, p. 69.

At the next term, September 13, 1866, without any pleadings, exhibits, evidence, or intervening proceedings of any kind, the following order or decree was summarily made and entered upon the records of the court:

"Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one-fourth

of the land mentioned in the petition herein to the complainants in this cause and appointing commissioners to divide and set apart the portion so decreed; and whereas said interlocutory decree was never carried into effect; and whereas since the time of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities in the same:

"It is therefore hereby ordered, adjudged, and decreed, by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and by the mutual consent and agreement of the said parties it is hereby further ordered, adjudged, and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of eighteen thousand dollars, to be divided among them *per stirpes*—that is, to the said Aloys Scheurick and Teresina Bent, his wife, one-third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent, and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the [said] Alfred Bent, deceased, and guardian *ad litem* for said children, for the purposes of the said division.

"And upon the further consent and agreement of the said parties it is hereby further ordered, adjudged, and decreed that the said Alexander Hicklin and Estefana Bent, his wife; the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent, and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, *within ten days from the day of the date of this decree*, make, execute, and deliver to the said Lucien B. Maxwell good and sufficient deeds of

conveyance of all their right, title, interest, estate, claim, and demand of, in, and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent, and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names; and by further consent and agreement between the said parties it is hereby further ordered, adjudged, and decreed that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves."

Before this last order or decree was made, on the 3d day of May, 1866, Guadalupe Bent, as guardian *ad litem*, had, in consideration of $6,000, which was stated to have been paid in hand, executed and delivered to Maxwell a deed purporting to convey the title to "the entire interest, estate, claim, and demand of the said Charles Bent, Julian Bent, and Alberto Silas Bent, said minor heirs of their father, said Alfred Bent, deceased, of, in, and to the real estate," etc., etc. No other deed was ever made by the guardian *ad litem* or by any commissioner or by any of the heirs of Alfred Bent for the land or for any interest in it, and, as the Court will see hereafter, they have never received any part of the purchase-money.

It did not appear at the time these proceedings took place that Alfred Bent had made a will, although it was a fact that he had made one, which had been admitted to probate in Taos county, where the suit was pending, on the 12th day of April, 1866. The existence of this will was not disclosed in either of the cases now pending in this Court until many

years after they had been instituted. It was introduced in the cases just before the final hearings, and is as follows:

"I Alfred Bent, being of sound mind and memory, and knowing the uncertainty of life and the certainty of death do hereby devise and decree as my last will and testament, in the presence of the subscribing witnesses, as follows to wit: first, I give and bequeath unto my wife Guadalupe Long Bent; for the maintenance of her and my three children Charles, William and Silas Bent, all of my real and personal property—money goods and effects after my just debts have been paid which are as follows to wit—to North and Scott of St. Louis the sum of five hundred and sixty-nine dollars with interest; to Mrs. S. Beuthner and L. B. Maxwell sixty dollars—to David Webster the sum of four dollars; which debts I desire shall be paid. I desire that my said wife shall be my executor and may join with her if necessary any person who may desire for her benefit and that of my children heirs as aforesaid.

"In testimony whereof I have this 9th day of December, A. D. 1865, subscribed my name in the presence of subscribing witnesses."

Rec. 90, p. 121; Rec. 91, p. 65.

In case No. 90, the complainants in the court below—appellees here—sought to have the trust in favor of the heirs of Alfred Bent determined and declared extinguished, upon the ground that the conveyance of the guardian *ad litem* and the proceedings of the Court hereinbefore recited invested Maxwell with their entire interest, while, in case No. 91, the complainants sought to have the same proceedings reviewed and reversed and the conveyance set aside and the original decree of 1865 executed. The district court granted the relief prayed for in the first case and dismissed

the bill in the second one, and its judgments were affirmed by the supreme court of the Territory.

Omitting the recitals of legal proceedings, the court below found and certified the following facts, as required by the act of Congress:

"The said will and foregoing record of proceedings in the probate court of Taos county, New Mexico, were not introduced in evidence in the present litigation until at the close of the testimony taken under the Maxwell Company's amended bill and the Bent heirs' bill, in 1866, and after the case of Thompson *vs.* Maxwell, 3 N. M., 269, had been decided by the supreme court of New Mexico and remanded to the district court.

"Beaubien had left six children. Maxwell married one of them, and purchased the interest of the other five for a consideration of not more than $3,500 each, at the following dates: Juana and her husband, Joseph Clouthier, and Isadora and her husband, Frederick Muller, April 4th, 1864; Eleanora and her husband, Vidal Trujillo, July 20th, 1864; Petra and her husband, Jesus G. Abreu, February 1st, 1867; Paul Beaubien, January 1st, 1870. Muller and Clouthier were merchants, residing at Taos; Trujillo and Abreu were farmers, stock-raisers, and also had stores; all four of them, as well as Sheurich and Hicklin, the husbands of Alfred Bent's two sisters, were intelligent men, ranked among the best citizens in their community, and were considered men of wealth and influence.

* * * * * *

"In the meantime the negotiations for compromise, which had been interrupted by the death of Alfred Bent, were resumed, the Bent heirs being now represented by Aloys Sheurich, husband of Teresina, one of the adult complainants, who acted in said negotiations on behalf of his wife, Estefana, and her husband, Hicklin, and Guadalupe Bent. A settlement with Maxwell was concluded by Aloys Scheurich, acting for his wife, Mrs. Hicklin, and her husband, and Guadalupe

Bent as guardian *ad litem* for Alfred's children, which was acceptable to said parties, by which Maxwell was to pay the sum of $18,000 for the conveyance of the interest or claim of the Bent heirs. The compromise was advised by Merrill Ashurst, the leading counsel for the Bent heirs, the grounds of his advice not being stated. It was accepted and carried out by the adult complainants Teresina and Estefana and their husbands, Sheurich and Hicklin. Sheurich and the other complainants did not consider their claim after the decree of 1865 as being doubtful or uncertain, but made a settlement, one of the reasons therefor being the consideration that the lawsuit involving their interests might drag on a long time, and that they were doubtful when the end would be reached. Maxwell having said to Sheurich that he would outlaw them or put them off from court to court, he having means to do so, and having some time before told Sheurich that he paid his attorney $1,000 to put the case off for six months.

"On May 3d, 1866, in pursuance of said compromise, Guadalupe Bent, *née* Long, executed a deed to Maxwell for the stated consideration of $6,000.

* * * * * *

"No other conveyance was made by Guadalupe Bent, the said conveyance having been prepared by counsel for Maxwell after one dictated by counsel for the Beaubien heirs.

"The same day Teresina Sheurich, *née* Bent, daughter of Charles Bent and sister of Alfred Bent, executed to Maxwell a like conveyance, conveying a like interest for the recited consideration of $6,000, with like covenants; and afterwards, on May 31st, 1866, Estefana Hicklin, also a sister of Alfred Bent and daughter of Charles Bent, joined by her husband, Alexander Hicklin, executed to Maxwell a like conveyance of a like interest for a recited consideration of $6,000, with like covenants."

Here follows the consent decree of September, 1866.

" The said decree was not made by the personal procurement, knowledge, or consent of said Scheurich or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter.

" No other pleadings, orders, or proceedings in said cause, other than those above mentioned or recited, appear in the record thereof, and the record thereof does not show whether or not any inquiry was made by the court or by its authority touching the value of the said premises, or of the interest of the now plaintiffs therein, or as to the necessity of disposing of the same, or touching the other estate or means of the said infants, or the ability of the mother of said infants to maintain and educate the said infants, or touching the propriety, necessity, or advisability of such sale and conveyance of the interest of the now plaintiffs, nor does there appear of record any motion, petition, or showing against the propriety of the original decree vacated by the said decree of September, 1866.

" The grant in question contains about one million seven hundred thousand acres, about two hundred thousand acres of which lie in the State of Colorado and the balance in New Mexico, and contains some of the best and most valuable lands in the Territory; it contains large areas of grazing and tillable land, and is traversed by several streams, furnishing water for irrigation, a small part of which was cultivated in May, 1866, and it contains, in addition, large bodies of timber, and in May, 1866, was known to contain considerable coal deposits, and was then believed and has since proven to have considerable deposits of precious metals, including gold and silver. At and about the year 1866 and for several years thereafter there was no demand for or sales of undivided interests in lands of the quantity, character, and location of those in question, such as to create any ascertainable market value thereof. Statements of the value of said land, in the opinion of the witnesses examined in the present suit, based upon a valuation per acre, are given in

the testimony, varying from two and one-half cents to one dollar and twenty-five cents, and it is impossible from these statements to satisfactorily ascertain or fix what was the value per acre of said grant in or about 1866. It cannot be said from the testimony that there was a market for such grants at the time in the sense of a demand for them, their value being largely speculative for the future.

"It is proven on the part of the complainants that the said Guadalupe Bent is a Mexican woman, and at the time of her said appointment as guardian *ad litem* to the infant complainants and at the time of the execution of her deed of May 3d, 1866, was ignorant of the English language, unable to read, write, or speak the same; was unfamiliar with business or with her duties as guardian *ad litem*; was without knowledge of the boundaries or extent of said lands, or the character or value thereof, or of the act of Congress confirming the said grant, or of the particulars of the decree of June 3d, 1865; that Maxwell represented to Sheurich that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red river, whereas it did so extend over 200,000 acres; that said Scheurich and Guadalupe Bent believed and were influenced by said representations; that the said Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, and was a resolute and determined man, and was at that time a man of large wealth and great power and influence throughout the county of Taos and Territory of New Mexico, as was known to said Guadalupe Bent, and he exercised such power and influence in such way that the weak feared to oppose him in matters of personal concern; that said Guadalupe Bent was in part influenced in executing said conveyance by this known character of Maxwell; that Maxwell made threats that unless the Bent heirs accepted the sum of $18,000 for their claims they would never get anything, and that no one should occupy any part of his land, and that such threats were communicated to said Guadalupe, and that this and

Maxwell's known character influenced her in making the conveyance to Maxwell; that the said conveyance was written in the English language and was not read over to said Guadalupe or interpreted to her, but it appears to be the fact that means of knowledge of the extent, character, and value of the said grant was open to the Bent heirs and to their counsel. It was not definitely known at the time where the boundary line between Colorado and New Mexico was. Guadalupe Bent acted in concert with the adult complainants in the suit, dealing with their own interests on the same terms as those she represented, and she was willing to make the same settlement they did. Both Scheurich and the counsel for the Bent heirs were conversant with both the English and Spanish languages and could read and write the same.

"It appears by Guadalupe Bent's own testimony, and the court accordingly finds, that when she executed the conveyance to Maxwell she understood there had been a settlement with Maxwell by which the interests of the Bent heirs were to be transferred to Maxwell for the sum of $18,000; that she understood the document she signed was a transfer of the interest in the Maxwell grant, which had belonged to her husband, Alfred Bent; that the settlement for $18,000 was satisfactory to her; that she supposed the document she signed was one which Scheurich had arranged with Maxwell; that she had relied on said Scheurich for advice, and was willing to accept and do whatever he thought best in the matter; that she believed she had authority to sign the deed and to convey the interest in said grant which her former husband, Alfred Bent, had claimed or owned, and it was her intention by the said deed to convey to Maxwell whatever interest in said grant had belonged to said Alfred Bent in his lifetime and was left by him at his decease, and the court finds that no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree.

"No money was received by Guadalupe Bent from Max-

well at the time of the execution of said conveyance. Maxwell, upon the execution of the deeds by her and the two sisters of Alfred Bent, gave to them his three promissory notes, payable in one year, amounting in all to $18,000, divided into such sums as were desired by the said parties. Guadalupe Bent received one of these notes for something over $5,000. As to the payment of this note the testimony is conflicting. Guadalupe Thompson testifies that it was paid to her second husband, George W. Thompson, because her husband told her so, to whom she was married about thirteen months after the death of her husband, and to whom she delivered said note, with everything else she had, when she married him and whom she authorized to collect said note. George W. Thompson and other witnesses testify that only a portion of said note was paid. The note is not produced, but its absence is accounted for by the statement of Thompson that he sent it to Maxwell at his request, to have a credit endorsed, and that he never got it back. It does not appear that Maxwell refused to return it. The weight of the evidence is found to be that at the beginning of the Maxwell Company suit a considerable sum, but how much cannot be ascertained, remained unpaid on the note. It also appears that Maxwell was at all times after the making of the note a man of ample financial responsibility. It does not appear that any part of the proceeds of said note was paid to the children of Alfred Bent or their mother, but George W. Thompson supported, maintained, and educated them during their minority, after his marriage to their mother, with the funds of his wife and himself, the same as his own children, keeping no separate account.

"Upon the execution and delivery of the deeds by Guadalupe Bent, guardian *ad litem*, and the adult complainants, May 3d, 1866, Aloys Scheurich and his wife assumed for complainants in said original suit payment of the fees of their counsel therein and paid the same, the amount thereof being included in the note of Maxwell given to Scheurich's wife

and the *pro rata* amount thereof being deducted from the other two notes given to Guadalupe Bent and Mrs. Hicklin in equal proportions. There is no evidence that such counsel or other counsel were afterwards retained by Scheurich or other of said complainants, and the record of the said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for the complainants in said cause and consented to the making of said order.

"The inventory of the property left by Alfred Bent and filed March 6, 1867, by Guadalupe Bent, as administratrix, in the probate court shows that outside of the real estate and the note received from Maxwell the total assets of the estate were $1,408. The debts mentioned in the will of Alfred Bent, together with additional claims against the estate admitted and allowed in the probate court, amounted to $2,423; but witnesses familiar with said Bent's affairs testify that at the time of his death he had both real and personal property, other than that inventoried, both in New Mexico and in Colorado.

"And the court makes and certifies the foregoing statement and findings as the facts proven and established by the evidence in each of said causes, and orders that the same be incorporated in the record as part thereof."

On behalf of the appellants we shall insist:

1. That the order of the court appointing a guardian *ad litem* for the infant complainants in the actions was wholly without authority of law, and neither conferred upon the person so appointed any power, nor imposed any duty, in respect to the persons or property of the wards.

2. That, even if the order was regular and valid, the guardian *ad litem* had no power to compromise the litigation or convey the interests of the infants in the real estate in controversy.

3. That the guardian *ad litem*, even if properly appointed, had no power to consent, and did not consent, to a decree for the sale or conveyance of the infants' interests in the real estate, and that the decree of 1865, so far as it adjudged the right of Alfred Bent to an undivided interest in the land, was not merely interlocutory, but was final and conclusive until reversed, and, consequently, the court had no power to set it aside.

4. That the court could not legally, either with or without setting aside the decree of 1865, authorize or direct a sale of the infants' interest in real estate, or validate a void sale of such interest.

I.

The ancestor of the infants was one of the complainants in the suit, and, after his death, the infants were, by an order of the court, without pleading, made parties complainant. The court had no power to select a guardian *ad litem* to prosecute a suit for them. The sole duty of such a guardian, except when otherwise provided by statute, is to defend in an action brought against the infant, and his duties and responsibilities cease absolutely when the litigation terminates. In the absence of statutory provision on the subject, an action in behalf of an infant who has no regularly appointed guardian of his person or estate must be prosecuted by a *prochein ami* selected by the infant himself or by those having an interest in the protection of his rights. In a few of the States the courts are authorized by statute to appoint guardians *ad litem* for infant plaintiffs, but there was no such law in New Mexico. (See 9 Am. and Eng. Enc. of Law, 90, and authorities there cited.)

By the appointment of the guardian *ad litem* and the subsequent proceedings in the court, the infants in this case were placed in the attitude of defendants, but no process was served upon them nor any answer filed for them. From the moment they were made nominal parties on the record, the original purpose of the action appears to have been abandoned, and it became a proceeding to sell and convey their interest in the real estate. The whole case clearly shows that the purpose to use the proceedings to divest the infants of their interest in the land which had been adjudged to their deceased father existed at the time the guardian *ad litem* was appointed, and this is the only reason that can be found for making such an appointment; but they still remained complainants on the record and could not be legally represented by a guardian *ad litem*, even for the original purpose of the action, and, most certainly, not for the purpose of disposing of their interest in the subject-matter of the suit, by either a compromise or a sale.

II.

Assuming that the appointment of the guardian *ad litem* was regular and valid, notwithstanding the infants were not defendants, it seems scarcely necessary to argue that she did not acquire, by virtue of the appointment, any authority or control over either the persons or property of the infants. Such a guardian does not stand *in loco parentis* to the infant. The only interest committed to the care of such a guardian is the interest of the infant *as a litigant* in the particular action in which the appointment is made, and even that interest remains under the protection of the court as well as

the guardian. No authority can be found recognizing the right of a guardian *ad litem* to compromise the substantial rights of the infant, or to sell his interest, or divest him of it by any process or proceeding, direct or indirect, either in or out of court; and yet it appears to have been contended in these cases that the alleged agreement or consent of an illiterate and ignorant guardian—who was, in fact, as incompetent as the infants themselves—imparted validity to a decree which, otherwise, has no semblance of legal support in the record.

At the beginning of this litigation, and for a long time afterwards, it was claimed by the appellees that they had compromised with or purchased the interest of Alfred Bent in his lifetime, and this was, in fact, one of the most substantial grounds upon which they originally based their case; but this allegation was afterwards withdrawn from their pleading (Rec. 90, p. 63), and the court below also found that it was not true (*ibid.*, 125). The claim of the appellees, therefore, so far as it depends upon a compromise or purchase, rests entirely upon the alleged agreement with the guardian *ad litem* and the conveyance made by her on the 3d day of May, 1866, which, it may be remarked here, was several months before the decree or order purporting to authorize a sale and direct a conveyance. But it is insisted that, although the guardian *ad litem* might have no authority, in virtue of her office, to compromise the suit or convey the interest of the infants in the land, she could, in virtue of her office, accomplish precisely the same thing by giving her consent to a decree. The court below, however, by a singular inversion of the propositions made by counsel, confined its discussion upon this part of the cases to the ques-

tion whether the alleged consent *vitiated* the decree or order; not whether it supported or justified the action of the inferior court in directing a sale. Of course, we do not contend that the consent of a guardian *ad litem*, or anybody else, would vitiate a decree which would be valid without such consent, but we do maintain that, where there is, as in this case, nothing whatever in the record to support the decree except the alleged consent of the guardian, the infants are not concluded by it.

On this point the elementary writers are so explicit and the decisions of the courts are so numerous and uniform that it will not be necessary to do more than cite a few of them in order to sustain our position. (See Am. Law of Guardianship, Woerner, 47 *et passim*; 9 Am. and Eng. Enc. of Law, 90, 153, and authorities cited.) Neither the guardian nor the infant can waive the service of process, much less consent to a final decree disposing of the infant's interest in the suit. (Pugh *vs.* Pugh, 9 Ind., 132; Whitesides *vs.* Barker, 24 S. C., 373; McClosky *vs.* Sweeney, 66 Cal., 53; Kansas City *vs.* Campbell, 62 Mo., 588; Wheeler *vs.* Ahrenbeck, 54 Tex., 535; 9 Am. and Eng. Enc. of Law, 155, and numerous authorities there cited.) Neither a guardian *ad litem* nor next friend can surrender any substantial right of the infant by stipulation (Bennett *vs.* Bradford, 132 Ill., 269; Walker *vs.* Grogan, 86 Va., 337; Crothy *vs.* Eagle, 35 W.Va., 143; Bearinger *vs.* Pelton, 78 Mich., 109; Tucker *vs.* Bean, 65 Me., 352; Cartwright *vs.* Wise, 14 Ill., 417; Peck *vs.* Adsit, 98 Mich., 639); nor can a guardian *ad litem* withdraw a plea and allow judgment to be taken (Peck *vs.* Prince, 21 Ill., 164; Lloyd *vs.* Kirkwood, 112 Ill., 329; Carneal *vs.* Streshley, 1 Marsh. (Ky.), 471). He has no power to make a settlement

of the matter in controversy (Edsall *vs.* Vandemark, 39 Barb., 589), nor submit the case to arbitration (Fort *vs.* Battle, 13 S. & M. (Miss.), 133); nor can he agree that one suit shall abide the result in another, although the cases are identical (McClure *vs.* Farthing, 51 Mo., 109). He cannot execute a valid release discharging the interest of a witness, in order to make his testimony admissible (Walker *vs.* Ferrien, 4 Vt., 523); and this Court has held that an infant is not bound by admissions contained in the answer filed by his guardian *ad litem* (Bank of U. S. *vs.* Ritchie, 33 U. S., 128; see also Kingsbury *vs.* Buckner, 134 U. S., 654; White *vs.* Miller, 158 U. S., 128). In the case last cited this Court said:

"In Wright *vs.* Miller, 1 Sandf. Ch., 109, it was held that the answer of an infant defendant by his guardian *ad litem* is not binding upon him, and no decree can be made on its admission of facts. Where relief is sought against infants, the facts upon which it is founded must be proved; they cannot be taken by admission, and Wrottsley *vs.* Bandish, 3 P. Wms., 236, was cited to the same effect. Where there are infant defendants and it is necessary, in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admission on the part of the adults, must be proved against the infants (1 Daniel's C. P., 238; Mills *vs.* Dennis, 3 John. Ch., p. 367). This record discloses that no proof whatever was adduced to sustain the allegations of the second bill. The admissions of the answers were solely relied on."

The decree complained of in the bill of review was set aside, this Court holding, in addition to the other grounds stated, that the court below should have given the infants the benefit of the statute of limitations, although the statute was not pleaded.

All the authorities agree that it is the duty of the court, in cases where infants are parties, even if there is a statute conferring jurisdiction, to see that the guardian *ad litem*, or other person representing them, protects their interests by making a proper defense or by properly prosecuting the action, as the case may be, and that, if he fails or refuses to do so, the court should remove him and appoint some one who will not neglect the trust reposed in him. If a court discovers that a person appointed to protect the interests of infant litigants is neglecting that duty, and, especially, if it discovers that he is engaged in an attempt to compromise the matters in dispute or to sell the property in controversy to the infant's adversary in the suit, it should take prompt and effective action to arrest the unauthorized proceeding, in order that the legal rights of the infant may be properly asserted; but no such action was taken in this case. On the contrary, the court assumed, without any legal evidence of the fact, that the guardian *ad litem* had made a settlement with the infants' adversary, and then it assumed, as matter of law, that she had power to do so; whereupon a decree or order was made, which shows upon its face that it is based upon nothing whatever except the supposed consent. No fact is recited in either of the decrees or orders, or shown by the record, to support the action of the court, except the alleged consent.

The order of April 12, 1866, which is the only one made before the execution of the conveyance, expressly states that it is entered "by agreement of the parties," and the decree or order of September 13, 1866, also, expressly recites that it is entered "by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause." The decree complained of does not state who gave or at-

tempted to give this consent for the infant defendants, and there is nothing in the record from which this information can be obtained. The supreme court of the Territory, however, in its findings of fact, states: "The said decree was not made by the personal procurement, knowledge, or consent of said Scheurich or Guadalupe Bent, and the fact of the entry thereof *was unknown to them for several years thereafter*" (Rec. 90, p. 130; Rec. 91, p. 74). The court does not find that the guardian *ad litem* was present, or that the infants were represented by anybody when the consent decree was made, but it does find and certify a fact which conduces strongly, if not conclusively, to show that they did not even have counsel employed at that time. That fact is, that on the 3d day of May, 1866, more than four months before the consent decree, the attorneys who had, up to that date, represented the adult complainants were paid their fees (Rec. 90, p. 133; Rec. 91, p. 77). The court also finds and certifies that "there is no evidence that such counsel, or other counsel, were afterwards retained by Scheurich or other of said complainants, and the record of the said decree of September, 1866, does not disclose what attorney appeared or assumed to appear for the complainants in said cause and consented to the making of said order." (Rec. 90, p. 133; Rec. 91, p. 77.)

The finding of the court is, therefore, substantially, that no consent was, in fact, given by the guardian *ad litem*, and there is no evidence to the contrary, even if such evidence could be considered on these appeals, except the general statement in the decree complained of, that it was made by the consent and agreement of the parties, which, in the absence of other explanation, always means the parties who were *sui juris*, and, therefore, legally capable of making the

agreement or consent. In the case of White *vs.* Miller, *supra*, in which the words, "I agree to the foregoing decree," were written at the foot of the decree and signed by the "solicitor for the defendants," some of whom were adults and others infants, represented by a guardian *ad litem*, this Court said: "But it is by no means a necessary inference from this writing that Mr. Morris either was or represented himself to be solicitor for the infants. The record shows that when the previous order of May 24, 1882, was made granting leave to file the supplemental bill, Messrs. Merrick and Morris appeared as solicitors for the adult defendants and consented to the filing of such bill. But it cannot be claimed that they thereby represented themselves to be entitled to represent the infants, because the bill itself shows that the infants were unrepresented, and prayed that a guardian *ad litem* should be appointed. The appointment of the guardian was subsequently made on July 5, 1882, when first the infants were in court. If the infant defendants are to be estopped by the consent of a solicitor, as against their submission of their rights to the protection of the court, the fact that they were actually represented by a solicitor should be made to appear either by a formal entry appearing of record or by evidence showing such fact. * * * Nor can it be safely implied, from the fact that Mr. Morris styled himself solicitor for the defendants and appeared before the auditor as such, that he had been employed to act as solicitor for the infants. Such conduct was entirely consistent with the admitted fact that he was authorized to appear for the adult defendants" (p. 149).

We think it entirely safe to say that no consent was, in fact, ever given for the entry of either of said orders or decrees, by the guardian *ad litem*, or by the infants, or by any

one authorized to act for them, and that the court proceeded in the matter solely at the request and upon the representations of Maxwell's attorneys; and, if this is true, the question of fraud or imposition in procuring the orders or decrees is wholly immaterial.

III.

If we are correct in the foregoing contention, the order or decree of the district court for Taos county, setting aside the decree of 1865, can derive no support from the alleged consent of the infants or their guardian *ad litem*, but must be sustained, if sustained at all, upon the sole ground that the vacated decree was interlocutory only, and, therefore, subject to the control of the court that made it. This is the view of the case taken by the supreme court of the Territory, as shown by the opinion delivered (Rec. 91, pp. 81–86). The alleged consent order of April 12, 1866, by which Guadalupe Bent was appointed guardian *ad litem* for the infants and commissioner in chancery, "with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate *therein described* to Lucien B. Maxwell, one of the defendants in said cause," requires very little notice in this discussion. It was evidently made at the instigation of Maxwell, and its purpose was to carry out, if possible, the compromise or contract of purchase which he, att hat time, and for a long time afterwards, was falsely asserting he had made with Alfred Bent in his lifetime. Mrs. Bent never qualified as commissioner, or attempted to act as such, and the very fact that this uninformed and inexperienced woman, who was confessedly incompetent to manage her own ordinary affairs, was appointed an officer of the

court is, of itself, sufficient to arouse suspicion as to the good faith of the transaction; but, whatever may have been the real purpose of the court in making the order or the intentions of the parties by whom it was procured, it was null and void, because the court had no jurisdiction to order or to authorize a guardian *ad litem* or a commissioner to convey the interests of the infants in the real estate which had been adjudged to them by a decree still in full force; for it is to be borne in mind that the decree of 1865 had not yet been set aside. The parties themselves appear to have concluded that the order of April, 1866, was nugatory, and consequently, at the next term of the court, September, 1866, they secured the order or decree setting aside the decree of 1865 and "all orders made under and by virtue of the same," and substituting an entirely new decree in the cause. (See Thompson *et al. vs.* Maxwell Land Grant and R'y Co., 95 U. S., 481.)

We insist that the decree of the district court for Taos county, rendered June 3, 1865, adjudging that the complainants in that case were the lawful heirs of Charles Bent, deceased; that said Bent was at the time of his death entitled and seized of one undivided fourth part of the land in controversy; that the complainants, at the death of their father, became seized of said undivided one-fourth interest and were "fully and absolutely entitled to and seized of" the same, and that the said interest "is hereby declared established and confirmed to them, the said Alfred, Estefana, and Teresina (alias Teresa T.), and to their heirs and assigns forever," was a final decree, even under the statutes authorizing writs of error or appeals, and that it was absolutely final and conclusive in the sense that it could not be set

aside or altered by the court after the expiration of the term, except upon proper proceedings for a rehearing or upon a bill of review. The essential matter in controvery in that action was the establishment of the interest of the complainants in the land, and this was, in fact, as will be seen from the pleadings, the only matter about which there was, or could be, any litigation. The right being established by the decree, a partition, if prayed for, followed as a matter of course. It is in such a case merely the execution of the decree. The action might have been maintained solely for the purpose of establishing the right of the complainants to an interest in the property, and, if established, a suit for partition could have been brought afterwards, or, if the right was established and a partition never made, the parties would own and hold the land in common. In other words, the establishment of the right by a court of competent jurisdiction would be just as conclusive without a partition as with it. In a suit for partition merely, in which there is no controversy concerning the rights of the parties, and a severance of the common interests is the only relief sought, there is ordinarily no final decree until the property is divided and the proceedings reported and confirmed; but it seems to us that it would be fully as reasonable to insist that a judgment for money is not final until the money is actually collected, or that a decree foreclosing a mortgage is not final until the property is sold, as to contend that, in such a case as the one under consideration, a decree establishing a controverted title is not final, because the interest of the successful party has not been actually set apart to him—that is, because the decree has not been executed.

It must be admitted that there is much confusion and ap-

parent conflict of opinion in the decisions upon this question; but, if any definite rule can be extracted from them, it is that, when a court has settled the merits of the whole controversy, or has determined the rights of the parties in respect to the subject of the controversy, and the subsequent proceedings are necessary only for the purpose of executing the decree or judgment, according to the rights of the parties as already adjudged, the decree or judgment is final.

In Forgay *vs.* Conrad, 47 U. S., 201, Chief Justice Taney said: "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one *to that extent*, and authorizes an appeal to this Court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed;" and in Dainese *vs.* Kendall, 119 U. S., 53, the Court said that a decree was final when it leaves the case "in such a condition that if there be an affirmance here the court below will have nothing to do but execute the decree it has already entered." In Bostwick *vs.* Brinkerhoff, 106 U. S., 3, Mr. Chief Justice Waite said that in order to make a decree final within the meaning of the acts of Congress giving the court jurisdiction on appeals and writs of error, it "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already ren-

dered." The same or similar language has been employed by the Court in a great many cases. (See Parsons *vs.* Robinson, 122 U. S., 112; Ray *vs.* Law, 7 U. S., 179; Whiting *vs.* Bank of U. S., 38 U. S., 6; Bronson *vs.* La Crosse & M. R. Co., 67 U. S., 283; St. Louis, I. M. & S. R. Co. *vs.* Southern Express Co., 108 U. S., 24; Winthrop Iron Co. *vs.* Meeker, 109 U. S., 180; and Keystone Manganese & Iron Co. *vs.* Martin, 132 U. S., 91, where the decisions on this question up to that time are cited and reviewed.)

The case of Wheeling & Belmont Bridge Co. *vs.* Wheeling Bridge Co., 138 U. S., 287, was one in which the court below had adjudged the condemnation of property and appointed commissioners to ascertain what would be a just compensation, but the commissioners had taken no action, and the question was whether the judgment of condemnation was final. Among other things, the court said:

"The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon both particulars. * * * If the judgment had been different, all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation which was to follow was to be made by commissioners to be appointed and might therefore be treated as being a distinct proceeding."

After giving these reasons why the judgment was conclusive on the questions decided, the court stated, as an additional one, that it had been so treated by the appellate court of the State, and said: "We can hardly consider it in any other light in exercising our appellate jurisdiction."

The decisions of the State courts upon this question are very numerous, and, owing to the various statutory provisions regulating appeals and writs of error, it is not possible, within reasonable limits, to classify and discuss them; but it may be said, generally, that, when not controlled by such statutes, they conform substantially to the principles stated by this Court. In Kreitline *vs.* Franz, 106 Ind., 359, and Jackson *vs.* Meyer, 120 Ind., 504, it was held that when, in a suit for partition, the title of one of the parties is disputed, a judgment which adjudicated that question and ordered the property to be divided was final and appealable. (See also Ansley *vs.* Robinson, 16 Ala., 703; Banton *vs.* Campbell, 2 Dana (Ky.), 421; Shepherd *vs.* Rice, 38 Mich., 556; Williams *vs.* Wells, 62 Iowa, 747; Talbot *vs.* Todd, 7 J. J. Marsh. (Ky.), 462; Bradford *vs.* Bradford, 37 Ala., 453; Jones *vs.* Wilson, 54 Ala., 50; Graham *vs.* Harding, 4 Dana, 559; Myers *vs.* Maury, 63 Ill., 211; Arnold *vs.* Sinclair, 11 Mont., 556; Sharon *vs.* Sharon, 79 Cal., 633; Balt. and Ohio R. R. Co. *vs.* P., W. & Ky. R. R. Co., 17 W. Va., 812, and Thornton *vs.* Fitzhugh, 4 Leigh, 209, quoted in Fleming *vs.* Bolling, 8 Gratt., 292.)

In all the cases where the judgments were held not to be final, there still remained some disputed question to be decided, affecting the substantial rights of the parties, such as cross-accounts between them to be investigated and adjusted, an amount or value to be ascertained upon testimony to be taken, in order to enable the Court to determine finally what the actual rights of the litigants were, or there was some express exception or reservation in the judgment or decree itself, showing that it was not intended to be conclusive.

So far as we are advised, all the decisions of this Court in

which judgments or decrees have been held not to be final were rendered in cases where the question of its jurisdiction to entertain an appeal or writ of error under the acts of Congress was involved, and in all such cases a very strict rule of construction has been adopted. In Beebe *vs.* Russell, 60 U. S., 283, and in The Palmyra, 23 U. S., 502, the Court declared that its practice was not to entertain an appeal or writ of error under the acts of Congress unless "the rights of the parties have been *fully* and finally determined;" or, in other words, that "the whole cause" must be finally determined, and the reason given was, that the cause could not be divided so as to bring up distinct parts of it. No such reason exists in this case; the decree claimed to be final is not before this Court on appeal or writ of error, and the jurisdiction of this Court is not involved. The question is simply, whether it was such a decree as the district court could, in view of the rights and interests determined by it, vacate or annul, without pleading or evidence or impeachment in any manner, after the expiration of the term at which it was rendered. That it distinctly adjudged substantial rights and interests which constituted the essential subjects of the controversy cannot be questioned, and, if it was not final and conclusive as to those rights and interests, it is difficult to see how the parties to a litigation can be concluded by the action of a judicial tribunal. A decree or judgment may not be appealable or subject to review on a writ of error, and yet be conclusive upon the parties as to all the matters adjudged, and be, also, beyond the power of recall by the court.

In the present case, the merits of the controversy were argued and submitted at one term and held under advisement until the next, and then the decree was rendered, re-

citing that it had been "heard upon the bill and amended bill and the answer thereto, the supplemental bill and answer, and the testimony on file, as taken in this cause," and the court then proceeded to adjudge and determine in favor of the complainants the whole matter in controversy between the parties concerning the right, title, and interest of the complainants in and to the land in dispute. It is perfectly clear that, if the determination of these questions had been in favor of the defendants, the whole controversy would have been ended, and all we contend for is, that their determination in favor of the complainants had the same conclusive effect as to the legal and equitable rights of the parties.

It does not purport to be an interlocutory decree, but an absolute and final adjudication upon all the controverted questions in the cause, leaving nothing further to be done, except to enforce the rights established, by executing the judgment of the court, and we submit that it must be treated as final in these proceedings. "An interlocutory decree is one made pending the cause, which leaves the determination of the particular question raised or the merits of the cause generally to a future hearing" (5 Am. & Eng. Enc. of Law, 371–'2; Freeman on Judg., sec. 29; Daniel Ch. Pr., 186; Teaff *vs.* Hewitt, 1 Ohio St., 511; Williamson *vs.* Field, 3 Barb. Ch., 281). Where the first decree in a suit for partition settles the rights of the parties, it is not interlocutory, but final. (Ansley *vs.* Robinson, *supra;* Banton *vs.* Campbell, *supra;* Damouth *vs.* Klock, 28 Mich., 163; White *vs.* Mitchell, 60 Tex., 164; Williams *vs.* Wells, 62 Iowa, 740.)

If the decree of 1865 was not final, neither was the order or decree of September, 1866, setting it aside and directing

conveyances to be made. The latter did not dispose of the whole cause; it did not dismiss the complaint, or approve any conveyances, or attest the payment of any purchase-money. In fact, no conveyance has yet been made in pursuance of that order or decree, and no part of the purchase-money has yet been paid to the infants or to the guardian *ad litem* for them.

IV.

If the infant heirs of Alfred Bent had any interest whatever, legal or equitable, in the land in controversy, whether that interest was based on a decree or not, the district court for the county of Taos had no power or jurisdiction to sell it, or to order or authorize their guardian *ad litem* to convey it in a compromise with their adversaries, or upon any other consideration. There was at that time no statute in the Territory of New Mexico conferring jurisdiction upon the courts to order or to authorize a sale of the real estate of infants, or of any interest therein, and, consequently, they had no power or jurisdiction over the subject, except such as belong to courts of chancery, according to the general rules and principles of our equity jurisprudence. Power to order the sale or encumbrance of the real estate of infants, except for the payment of debts, is not inherent in courts of chancery; it is a special power and must be conferred by statute, and the mode in which it shall be exercised must be, and always has been, prescribed by statute. In England, from which country our system of equity jurisprudence was derived, the court of chancery does not now possess, and never has possessed, a general power to decree such sales.

(See *In re* Haworth, L. R., 8 Ch., 415; Fentiman *vs.* Fentiman, 13 Sim., 171; Taylor *vs.* Phillips, 2 Ves., 23; Russell *vs.* Russell, 1 Moll., 525; Calvert *vs.* Godfrey, 6 Beav., 97; Ware *vs.* Polhill, 11 Ves., 278; *Ex parte* Phillips, 19 Ves., 122.) Under some circumstances, the court may permit charges to be created against the reversionary estates of infants, but they cannot order their sale for any other purpose than the payment of debts. (De Witte *vs.* Palin, L. R., 14 Eq., 251; Munn *vs.* Hancock, L. R., 6 Ch., 850.)

The case of Charles Bent *et als.*, heirs of Alfred Bent, *vs.* The Maxwell Land Grant and Railway Company *et als.* (No. 91) has twice been in the supreme court of the Territory—once by appeal from the judgment of the district court sustaining a demurrer to the bill, and again, on appeal from the decree refusing the relief prayed for and dismissing the bill. The first decision is reported in 3 New Mexico, 227, and in it the court expressly held that the district court had no power or jurisdiction to make the decree of September, 1866, upon the ground that there was no statute authorizing such a proceeding; and it held, further, that the decree of June, 1865, vested in the complainants a legal estate in the land in controversy, which, to the extent of the interest of their deceased father, had descended to the complainants in the action now pending. In thus holding, the court necessarily decided that the decree of June, 1865, was final, because it is plain that, if it was merely interlocutory, it could not vest a legal estate, or any estate, in the complainants. Having thus stated the law of the case, the supreme court of the Territory sent its mandate to the court below, commanding it to reinstate the suit on the docket "and further proceed therein according to law." (Rec. 91, pp. 22, 23.)

We insist that the questions decided by the supreme court on that appeal were not thereafter open for consideration or for a different decision in the district court, or in the supreme court itself, on the second appeal, and that the judgments now before this Court for review should be reversed on the ground, even if there were no others, that the law of the case, as it had been authoritatively established, was wholly disregarded by both tribunals. If the decision of the supreme court on the first appeal was erroneous, it could be corrected only by a proceeding for a rehearing, or by an appeal to this Court, and, until corrected by one or the other mode, the parties and the courts were bound by it in all subsequent proceedings in the case. The parties, in the preparation of their cause for trial, had a right to proceed upon the assumption that the law, so far as it related to the questions decided by the appellate court, was settled, and that there could not be a second appeal involving precisely the same matters and resulting in a decision directly in conflict with the one upon which they had relied during the progress of the litigation.

The cases in which it has been held that the court below is absolutely bound by the judgment of the appellate court, and that the same questions cannot be presented for consideration on two appeals or two writs of error in the same case, have generally arisen where the appellate tribunal, on the first appeal or writ of error, had, by its opinion and mandate, disposed of the entire controversy and prescribed the character of decree or judgment to be entered below, but, in several of them, the causes had simply been remanded for further proceedings, as in the case now presented. The principle, however, upon which the rule is based, and the evil it is intended

to prevent, are the same in both classes of cases. Whether the second appeal or writ of error was taken, or attempted to be taken, by the same party who prosecuted the first, or by his adversary, is immaterial, nor does it make any difference whether the attempt to reopen the question is made in the appellate court which finally decided it or in the inferior court to which the case has been remanded. The parties are concluded in all courts, and if this were not so the rule would be inoperative as a check upon useless and repeated litigation of the same question. "No question," says this Court *In re* Sandford Fork and Tool Co., 160 U. S., 247, "once considered and decided by this Court can be re-examined *at any subsequent stage* of the same case;" and in the case of Roberts *vs.* Cooper, 61 U. S., 467, where there was a new trial in the court below after the decision here, and the court below "was requested to give instructions to the jury contrary to the principles established by this Court on the first trial," the Court said: "It has been settled by the decisions of this Court that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second." And again it said: "There would be no end to a suit if every obstinate litigant could by repeated appeals compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members." In these two cases, and many others, it was held that the opinion delivered by the appellate court could be examined to ascertain what questions that court had considered and decided, and what was the scope and meaning of its mandate.

In the latest case upon this subject—Smith *vs.* Vulcan Iron Works, 165 U. S., 518—there had been an appeal from the circuit court to the circuit court of appeals, which had reversed the decree of the lower court, and, on the filing of the mandate, that court dismissed the bill. A second appeal was then taken to the circuit court of appeals, not by the same party who had taken the first one, but by his adversary, and, that court having dismissed the appeal, the cause was brought here. This Court said: "And the merits of the case, having been once determined by the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, *either in that court or the court below*" (page 525). See also Kingsbury *vs.* Buckner, 134 U. S., 650, and the numerous decisions cited in that and other cases.

The territorial courts established by the laws of Congress constitute parts of the judicial system of the United States, and are as much bound by the rules and principles laid down in the decisions of this Court as the permanent district and circuit courts (Montoya *vs.* Donohoe, 2 New Mex., 214). If a circuit court or a circuit court of appeals of the United States had decided this case upon appeal or writ of error, in the same way that it was decided by the supreme court of the Territory on the first appeal, and it had been again brought by appeal or writ of error before the same appellate court, this Court would not have hesitated to declare, without waiting for argument, that the questions decided on the first appeal or writ of error were not open for reconsideration, and we are unable to discover any reason why the same rule should not be applied in a case decided by the supreme court of a Territory.

All new questions, if there were any, arising in the case after its return from the appellate tribunal were open to consideration by the court below, and might have been considered and decided by the appellate tribunal when the cause again came before it; but the questions settled upon the first appeal or writ of error, and the rules and principles of law upon which they were settled, are, for all the purposes of that case, forever disposed of. If the judgment of the appellate court was erroneous, the aggrieved parties had their remedy by application for a rehearing or by appeal to this Court, but they could not waive these proceedings and retry the same questions, either in the court of original jurisdiction or in the appellate tribunal. They could not "speculate on chances from changes" in the membership of the court, or repeat and prolong the litigation of the same questions for any other purpose. They could not even maintain a bill of review for alleged errors in the record prior to the return of the mandate of the appellate court. (Southard *vs.* Russell, 57 U. S., 547; Kingsbury *vs.* Buckner, 70 Ill., 514; Brewer *vs.* Bowman, 3 J. J. Marsh., 492.)

The question as to the finality of the decree of 1865 and the character and extent of the interest vested by it in the ancestor of the infant complainants, and the question as to the power and jurisdiction of the district court for Taos county, with or without the alleged consent of the guardian *ad litem*, to set aside that decree and order a sale or conveyance of the infants' interest in the land, were directly and necessarily involved, and were decided, on the first appeal. They did not arise in the case after its return to the lower court, nor did any other matter appear in the case after that time to render these questions less important or controlling

than they were when decided in the appellate court. They were, at the beginning, and continued to be throughout the litigation, the fundamental and controlling questions in the cause. The whole right of the complainants depended upon their decision.

The Maxwell Land Grant and Railway Company and Luz B. Maxwell (her husband, Lucien B. Maxwell, having died) were parties to the appeal in which the decision to which we have referred was rendered, and they are the only parties complainant—now appellees—in the other case (No. 90) now before this Court. The parties and the interests being the same, and the questions being the same in both cases, that decision was binding and conclusive in both, and the district and supreme courts of the Territory should have so held.

The case brought by the Maxwell Land Grant and Railway Company *et als.* against Guadalupe Thompson and the heirs of Alfred Bent (now No. 90) was once before in this Court on appeal, and was decided in December, 1877 (95 U. S., 391), and we concede that the decision then made was binding upon the lower courts and the parties at all subsequent stages of the cases, as to all the matters then in the record and considered and disposed of by the Court. It is necessary, therefore, to ascertain what was actually decided by this Court on that appeal. An examination of the opinion will show that, without considering or deciding the merits of the case, the decree below was reversed—

1. Because the complainants had "entirely failed to substantiate the *main fact* relied upon by them, namely, that the agreement for a compromise was concluded with Alfred

Bent in his lifetime." This fact has not yet been established, as the Court will see from the findings of the court below.

2. Because the decree which the complainants asked to have reviewed and set aside upon a bill of review was one to which they had themselves consented.

3. Because the bill of review was not brought by the original defendants, but by their assignee, The Maxwell Land Grant and Railway Company; and,

4. Because the bill sought "a reversal and modification of the decree upon an alleged matter of fact not appearing upon the record, namely, that the compromise agreement was made with Alfred Bent in his lifetime, without alleging any newly discovered evidence unknown to the parties before the decree."

In brief, the Court decided that a bill of review was not a proper proceeding to obtain relief in such a case, but that, inasmuch as considerable evidence had been taken, the complainants should have leave to amend their bill so as to convert it into a pleading to quiet title, with leave also to both parties to take additional evidence upon any new matter that might be put in issue by the amended pleadings. The mandate of this Court was strictly carried out in the court below, and all the subsequent proceedings in the case were consistent with it and with the decision upon which it was based; and, on the appeals now pending, this Court is not asked to make any ruling that would conflict with any proceeding had in either of the courts below in accordance with that decision and mandate.

But, independently of all the foregoing considerations, it is scarcely conceivable that any court in this country should have power to order a sale or conveyance of the real estate of infants, or of any interest therein, without any pleading or evidence to support its decree. So far as we know, there has never been a statute anywhere authorizing such a summary proceeding, and it would be a strange inconsistency in our judicial institutions if any court could, in the absence of express legislative authority, divest infants or other persons laboring under disabilities, of their estates in this manner, even should they or their guardians or committees attempt to consent.

In the carefully considered case of The Bank of the U. S. *vs.* Ritchie, 33 U. S., 128, the question arose under a statute of Maryland authorizing sales of real estate descended or devised to infants to pay the debts of their ancestor when it appeared that there was not sufficient personal estate left for that purpose, and when, "upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of such real estate." A guardian *ad litem* was appointed for the infants, and he filed an answer consenting to the sale; but upon a bill of review the decree and all sales and conveyances made under it were reversed and set aside by this Court. Mr. Chief Justice Marshall said:

"He (the guardian) was appointed on the motion of the counsel for the plaintiffs without bringing the minors into court or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage and is certainly a mark of inexcusable inattention. The adversary counsel is not the person to name the guardian to

defend the infants. The answer of the infant defendants is signed by their guardian, but is not sworn to. It consents to the decree for which the bill prays, and without any other evidence the court proceeds to decree a sale of their lands. This is, we think, entirely erroneous. The statute under which the court acted authorizes a sale of the real estate only where the personal estate shall be insufficient for the payment of debts, when the justice of the claims shall be fully established, and when, upon consideration of all circumstances, it shall appear to the chancellor to be just and proper that such debts should be paid by a sale of the real estate. Independent of these special requisitions of the act, it would be obviously the duty of the court, particularly in the case of infants, to be satisfied on these points.

"The insufficiency of the personal estate of Abner Ritchie to pay his debts is stated in the answer of the administrator; but it is not proved, and is admitted in that of the guardian of the infants, but his answer is not on oath; and if it was, the court ought to have been otherwise satisfied of the fact.

"The justice of the claims made by the complainants is not established otherwise than by the acknowledgment of the infant defendants in their answer, that 'according to the belief and knowledge of their guardian, they are, as alleged in said bill, respectively due.' The court ought not to have acted on this admission. The infants were incapable of making it, and the acknowledgment of the guardian, not on oath, was totally insufficient. The court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just before proceeding to sell real estate" (pp. 144, 145).

See also Walker *vs.* Parker, 38 U. S., 166, where the Court said:

"There is no evidence which will enable the Court to judge whether a sale or partition of the property would be to the advantage of the infant and the other parties; and it should

hardly be expected that this Court, in the absence of all evidence, should decree either of these alternatives against the answer."

In these cases the jurisdiction of the court to order the sale of infants' real estate for the payment of debts was unquestionable, and, consequently, the only inquiry was, whether the proceedings had been such as to sustain the validity of the decree; but, in the case now presented, there was no pretense that the sale or conveyance of the interest was made for the purpose of paying debts, and the court, therefore, had no jurisdiction, by statute or otherwise. To call this transaction a settlement or compromise does not change its real character in any respect, for, whether it is called a compromise or a sale, its effect was to relinquish or transfer the interest of the infants in the land. It was a sale both in form and substance, and it was treated as a sale by the court that ordered or authorized it, and by every other court in which the case has been heard. A formal conveyance upon an expressed consideration of six thousand dollars was made by the guardian *ad litem* of an undivided one-twelfth interest in the tract of land, "being the entire interest, estate, claim, and demand of the said Charles Bent, Julian Bent, and Alberto Silas Bent, said minor heirs of their father, said Alfred Bent, deceased," with all the usual covenants against incumbrances, and a general warranty. Nothing whatever is stated in the deed concerning a compromise or settlement of the suit, and it was, in fact, executed more than four months before the alleged consent order or decree. If it had been intended or considered merely as a compromise and settlement of a doubtful claim, it would have been necessary only to procure a release and have the bill dismissed; but Maxwell

actually purchased the interest of the infants from their guardian *ad litem* and accepted a deed for it, thereby admitting their title, and he and all claiming under him are estopped to deny it. If this transaction was in fact a mere settlement or compromise of a suit—a simple relinquishment of the complainants' claim to property which Maxwell supposed really belonged to him—and was so understood by the parties, it is most remarkable that he should have exacted from the guardian *ad litem* a full and complete conveyance, with a covenant against "all incumbrances" and a general warranty of title against all the world.

The circumstances under which this purchase was made are set out in the findings of the court below, to which we respectfully invite the particular attention of this Court. If, by reason of the statute governing these appeals, the question of actual fraud or undue influence in procuring the conveyance and the alleged consent to the decree cannot be investigated and decided by this Court, we nevertheless insist, that the facts certified in the records are of such a character as to make it the duty of the Court to withhold its sanction from the proceedings, unless the jurisdiction is clearly shown, and all the requirements of the law were strictly complied with.

In addition to the great wealth, power, and influence of Maxwell, his domineering disposition, his open threats, his misrepresentations as to the area of the tract of land, and the almost total ignorance and inexperience of the guardian *ad litem*—all which is found and certified—it appears that, although the deed acknowledges the payment in hand of six thousand dollars, no amount whatever was paid or secured to be paid, except by the personal note of the pur-

chaser, and that when the cases were finally tried, in 1893, no part of the money had been paid to the guardian *ad litem* or to the infants, and the note had passed into the hands of Maxwell (Rec. 91, p. 132; Rec. 91, p. 76). The court also finds and certifies that no compromise or sale was made by Alfred Bent in his lifetime, so that the order of April, 1866, and the order or decree of September, 1866, are without any support whatever, except the transaction between the guardian *ad litem* and Maxwell and the alleged consent, which we have shown was not in fact given and could not have been legally given.

The court below seems to have been unable to find the value of the interest of the infants in the land, and, therefore, merely refers to the conflicting evidence on the subject, but, under the act of Congress, the testimony is not here; and there is a total failure upon the part of the court to find and certify any fact conducing to show that the sale or conveyance ordered by the district court was advantageous in any respect to the interests of the infants, or that it was necessary or proper for any purpose. It clearly appears, however, from the opinion that the court was not satisfied from the evidence that the arrangement was advantageous to the infants. It says that "while we are not prepared, in view of the testimony submitted since the decision in Thompson *vs.* Maxwell, 95 U. S., 400, to say that 'the proofs show a case which, in our judgment, supports the conclusions of the decree to the effect that the terms of the compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf,' we do hold that the judgment

of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion," etc. Even if the district court had jurisdiction to make the decree, which we deny, it was not a case in which the rights and interests of the infants could have been disposed of at the discretion of the chancellor. According to the long-established rules of law and equity, such a decree must be supported by pleadings and evidence, and such facts must be shown as constitute a basis for the exercise of this extraordinary jurisdiction. It would seem, therefore, that the failure of the supreme court to find and certify any fact to support the decree must be fatal to its conclusion that it was a valid or proper exercise of power by the district court.

But, notwithstanding the court had no jurisdiction to decree the sale or conveyance of the interest of infants in real estate for any purpose, except, probably, in the absence of personal property, for the payment of debts due from the ancestor, it made an order purporting to authorize the guardian *ad litem* to convey, and afterwards a decree peremptorily directing a conveyance to be made, for a fixed sum, to a particular person, within ten days, without any pleading on the subject; without any inquiry as to the extent or value of the property or the condition of the infants; without fixing any time for the payment of the purchase-money or requiring any security; without making any provision for the reinvestment of the money or taking a bond from the guardian *ad litem* for its safe-keeping; without any evidence to show that a sale would be advantageous to the infants in any respect, or that it was necessary in order to provide for their nurture or maintenance; without giving them a day to appear

and reopen the decree, and without reserving any power over the decree itself or over anything that might be done under it, not even to the extent of requiring a report to be made. Such orders and decrees are not merely erroneous, but absolutely void and of no effect, and all acts done under them must fall with them.

It will be observed that the order and decree and the conveyance by the guardian *ad litem* were all made upon the supposition that Alfred Bent had died intestate, and that his interest in the land had descended to his heirs-at-law, the will not having been presented by either party in the case. The question as to the character and extent of the interest taken by the infants under the will is one which can be authoritatively decided only in a case between them and their mother, and we do not consider it necessary to discuss it at length in these cases. If they had at the date of the decree, and conveyance, and at the institution of these suits, any interest in the property, no matter how derived, they are entitled to relief. We think, however, that the will, if valid, devised to Guadalupe Bent a life estate only, during which she holds in trust for the maintenance of herself and children, and that, subject to the life estate, the property descended to the heirs-at-law of her deceased husband. It is clear that, if valid, it gives the children some interest, either legal or as *cestuis que trust*; and that, if invalid, they inherited the whole estate. But, in our opinion, under the laws in force in New Mexico at the time the will was executed, it was null and void, because it attempted to disinherit, partially, at least, the children of the testator, without stating a legal reason, or any reason, therefor. By the general laws of Spain, which were in force in New Mexico until changed

by local statute, no child could be disinherited by a parent, except for certain enumerated causes, which were required to be expressly stated in the will; and the disinheritance, in order to be valid, must be total, the child being, under the law, entitled to his equal share or nothing (Inst. of Civ. Law of Sp., 1 White, New Comp., 104, 106, 107, 108; *ibid.*, Introduction, p. x). By an act passed in 1846, but which was subsequently changed so as to make it conform to the new political relations of the Territory, it was provided that the laws theretofore in force concerning descents, distributions, wills, and testaments "as contained in the treatises on these subjects written by Pedro Murillo de Lorde (Velarde) shall remain in force so far as they are in conformity with the Constitution of the United States, and the statute laws in force for the time being" (Comp. Laws of 1884, sec. 1365). The act of January 12, 1852, provided that "parents and ascendants have the right to disinherit their descendants for the following causes," and it then proceeds to enumerate eleven grounds upon which a child or descendant may be disinherited (Comp. Laws of 1865, chap. 5, sec. 5; Comp. Laws of 1884, sec. 1416). An act passed in January, 1876, declared that "the common law as recognized in the United States of America shall be the rule of practice and decision." (See Browning *vs.* Browning, 3 New Mexico, 371; Bent *vs.* Thompson, 138 U. S., 114.)

Section 1414, of the Compilation of 1884, provides for various deductions from the estate of a decedent, and declares that what is left shall be equally divided among the children, their part being, in the language of the statute, "what is styled the legitimate portion of said children;" and in this respect it greatly resembles the civil law of Spain, heretofore cited.

In Velarde, ten legal causes for disinheritance are enumerated, and it is stated that "the act of disinheritance should be effected by naming the person to be disinherited, or by so describing him that there may be no doubt (regarding his identity), without condition, and must include all his goods (share), as otherwise it will be invalid. In order that the disinheritance of descendants may be valid the cause must be set forth and also proved by either the testator or by the constituted heir (devisee or legatee); this is not necessary if the heir tacitly or expressly consents to such disinheritance; in that case he shall have no right to oppose it, nor to be heard in judgment."

Velarde, chap. 8; title "Of disinheritance and of the 'inofficious' will."

A comparison of the provisions of the Institutes, the statutes and the law as laid down by Velarde will show that, while some changes have been made in the causes for which a descendant may be disinherited, certain specified causes must actually exist, and the manner in which the act of disinheritance, whether total or partial, shall be attested, in order to be valid, remains unaffected by legislation.

We respectfully ask that the judgments in both cases be reversed, with directions to the court below to dismiss the bill in the first case, and to set aside the order, decree, and conveyance of 1866 and execute the original decree of 1865, ordering a partition of the real estate in controversy.

J. G. Carlisle,
Logan Carlisle,
For Appellants.